IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25/09/2002

CORAM

THE HONOURABLE MR. JUSTICE A. KULASEKARAN

Criminal R.C. No. 1499 of 2002

V. Krishnan ... Petitioner

-Vs-

State, rep. by
Central Bureau of Investigation
Chennai ... Respondent

Revision under Section 397 & 401 of Cr.P.C. to set aside the proceedings of the court below passed by the Additional Special Judge for CBI cases, Chennai in Crl.MP No. 13 of 2002 in C.C. No. 3 of 1999 as stated therein.

For Petitioner : Mr. Karthik

For Respondent : Mr. N.Ranganathan, Special Public Prosecutor, CBI Cases

:ORDER

The petitioner has filed the above revision seeking to set aside the order passed by the Additional Special Judge for CBI cases, Chennai in Crl.MP No. 13 of 2002 in C.C. No. 3 of 1999 dismissing the application filed under Section 91 of Cr.P.C. to summon documents.

2. Heard both sides. The petitioner is the 2nd accused in C.C. No. 3 of 1999 for the offence under Section 120-B r/w. Section 409, 420, 477-A IPC and Section 13 (2) r/w Section 13 (1) (d) of Prevention of Corruption Act, 1988 on the file of th nal Special Judge for CBI Cases, Chennai.

3. The petitioner has filed an application under Section 91 of Cr.P.C. to summon the document namely "Note to Chairman and Managing Director' dated 01-06-1998 regarding the meeting of the Chief Vigilance Committee (CVC) on 29-05-1998 to discuss the prosecution case by the Chief Vigilance Officer. The said petition was dismissed by the trial court, hence this revision.

4. Mr. Karthik, learned counsel appearing for the petitioner submitted that the document summoned is vital to demolish the evidence of PW1, who has accorded sanction; that the trial court failed to see that the sanction is a sacrosanct act, which was accorded without application of mind by PW1; that denial of suggestion by PW1 pertaining to the document is not a sufficient reason for dismissing the application; that the respondent/CBI has not pleaded that production of the said document would cause breach of public interest; that the document is not a privilege document and that the court below erroneously dismissed the application misconstruing the provisions of Section 124 of the Indian Evidence Act.

5. Mr. Renganathan, learned Special Public Prosecutor for CBI cases appearing for the respondent argued that the note sheet sought to be summoned are privileged and confidential document, which cannot be summoned; that PW1 is neither the author of the document nor receipt of it as such he is not competent to speak about the same; that the document is a communication between two officers, which is nothing but an official communication as defined under Section 124 of Indian Evidence Act as such it cannot be compelled to be produced and prayed for dismissal of the revision.

6. The trial court, after hearing both sides held that the document in dispute is an official communication between the officials concerned, hence it is privileged document and it cannot be summoned. The trial court further found that though the prosecution has not clearly stated in their counter as to in what manner the public interest would be affected by disclosure of the document, however held that the document is confidential in nature as defined under Section 124 of the Indian Evidence Act. The learned Special Judge has also relied on a decision reported by this Court in 2001-2-Law Weekly (Criminal) Page 643 (K. Sivanandam Vs. State, rep. by Inspect or of Police, Special Police Establishment Central Bureau of Investigation Anti-corruption Branch, Chennai – 6) in support of his conclusion.

7. Now, we look into the relevant provisions of Criminal Procedure Code and Indian Evidence Act:-

"Section 91 of Cr.P.C. - Summons to Produce document or other thing:-

(1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceedings under this code by or before such Court or Officer, such Court may issue a summon, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this Section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this Section shall be deemed-

(a) to affect Sections 123 and 124 of the Indian Evidence Act, 1872, or the Bankers, Books Evidence Act, 1891 (13 of 1891), or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority."

Sections 123 & 124 of Indian Evidence Act:-

123. Evidence as to affairs of State – No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the Officer at the head of the Department concerned, who shall give or withhold such permission as he thinks fit.

124. Official communications – No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interest would suffer by the disclosure.

8. Section 91 of Cr.P.C. confers a wide discretion on the Court to order production of documents, but the discretion has to be exercised judicially. The power can be exercised by the Court at any stage at the request of any party including the accused, but can be done only when the court, on consideration of all the fa cts and circumstance, finds that the production of the document or thing called for is necessary or desirable in the interest of justice and have some relation to or connection with the subject matter of trial. The court shall satisfy itself whether the document or thing is necessary for a trial even though the application filed by the party does not disclose the grounds as to why production of the same is necessary.

9. It is well settled that summoning of the document is purely discretionary of the court. The section does not give an absolute right to the accused to summon all documents. If only when the court on a consideration of the facts and circumstance of the case, finds that production of the document is necessary or desirable for the purpose of trial, it shall summon the same, but not otherwise.

10. In Sub-section 3 of Section 91 of Cr.P.C. it is stated in unequivocal terms that nothing shall be demed to affect Section 123 and 124 of the Evidence Act or the banks, books, evidence Act 1891 or apply to a letter, postcard, telegram or other document or any parcel in the custody of the postal or telegraph authority. Section 123 and 124 of the Evidence Act can be understood as mutually exclusive, but they do overlap. The difference between the two is Section 123 applies only to evidence derived from unpublished official records relating to any affairs of the state; whereas Section 124 applies to communication made in official confidence where such communications are in writing or not and whether they relate to any business of the state or not.

11. Any communication made between two public officers in official confidence for which privilege is claimed and when it's production is objected to on the ground that it would be detrimental to the public interest, the Court shall desist from compelling its production. As rightly pointed out by the trial court, the pr osecution has not canvassed in clear terms the prejudice to public interest. In this case, the communication made between the respective officers relates to the opinion expressed and an official decision is reached in the course of determination of the question of according sanction for which privilege was claimed. It is open to the public authority that the privilege can be claimed in the interest of efficient administration and proper functioning of public service though adequately not bring out the involvement of public interest consequent upon the disclosure of the document. I rely upon a decision reported in AIR 1977 SC 2201 (State of Orissa and others Vs. Jagannath Jona etc.,) wherein in Para-3 it was held thus:-

"3. We would like to observe that the view which the High Court has taken in regard to the disclosure of the particular notings is principally based on the inadequacy of the affidavits filed on behalf of the Government of Orissa. The High Court has summarised the effect of the various decisions of this Court which have a direct bearing on the question of privilege and we are in no doubt that it would not have rejected the State's claim of privilege in regard to departmental notings contained in official files, except for the fact that the affidavits filed on behalf of the Government did not adequately bring out the involvement of public interest consequent upon the disclosure of the notings. The judgment of the High Court has therefore to be confined to the particular facts of the case and cannot be based as a precedent in other cases for calling upon the Government to produce confidential notings in official files, if the disclosure thereof is calculated to impair public interest.

Therefore, I am of the view that the document sought to be summoned is a privilege document.

12. Now, we look into the aspect whether the document impinge on the question of guilt or innocence of the accused. In a particular case, the guilt or innocence of an accused depended on the production of a document in respect of which privilege is claimed, the Court could overrule the claim of privilege. Whereas, in the case on hand, the document sought for is relating to sanction accorded for prosecution, which do not relate to the question of guilt or innocence of the accused, in other words not relate to alleged charges. I seek guidance from a decision of the Hon'ble Supreme Court reported in AIR 1973 SC 2 751 (Kishan Narain Vs. State of Maharashtra) wherein in Para-7 it was held thus:-

"7. It is not necessary for the purposes of this case to consider the scope of the powers of the court to examine the documents in respect of which privilege is claimed under Sections 123, 124 and 125 of the Evidence Act. Nor do we think that the English decisions on the point would be wholly apt in the circumstances of this country. In England, the law regarding

evidence is wholly Judge-made law but in this country the duty of the Judge is to interpret the provisions of the Evidence Act in its application to the particular circumstances of a case. Whether if in any particular case the guilt or innocence of an accused depended on the production of a document in respect of which privilege is claimed the court could overrule the claim of privilege is not a question which we need consider. That question does not arise in this case. The documents in respect of which privilege is claimed in this case do not impinge on the question of guilt or innocence of the accused. They do not relate to what happened on the 13th and 14th of August 1964. We do not, therefore, feel it is necessary to consider the decisions in Conway V. Rimmer, (1968) 1 All ER 874 and Marks Vs. Beyfus, (1890) 25 QBD 494.

The court below has rightly rejected the claim of the petitioner herein on that ground also.

13. The order passed by the learned trial Judge is well considered in appreciation of the provisions of law and I do not find any infirmity. The revision is therefore dismissed.

25-09-2002
rsh
Index : Yes
Internet : Yes

To

1. The Additional Special Judge
for CBI Cases
Chennai

2. The Central Bureau of Investigation
Chennai

3. The Public Prosecutor
High Court

□